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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1189

AMERICAN STANDARD INC.,
Petitioner,

v.

CRANE CO., *et al.*,
Respondents.

PETITIONER'S REPLY BRIEF

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Understandably, Crane's brief in opposition makes no attempt to justify the Court of Appeals' holding that even the actual receipt of inside information by a 10% stockholder engaged in a contest for corporate control cannot result in § 16(b) liability. Instead of facing up to the far-reaching legal issue that this decision raises, Crane attempts to sidestep it by pressing the same unfounded factual contentions that the Court below properly refused to accept.

The decisive fact is that Crane sought, obtained, used and greatly profited by confidential information illicitly obtained from Air Brake's management. The evidence of this conduct is nothing less than the sworn testimony of Crane's own chief executive officer. The issue raised by the decision below, then, is whether Crane, merely because it was engaged in a contest for control, should be exonerated

from §16(b) liability *in spite of* its misuse of inside information.

The Court below held that this Court's 1973 decision in *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973), compels just such an anomalous result.[1] We ask this Court to grant review in order to consider whether this result is consistent with *Occidental*, or is its antithesis.

I.

According to Crane, the Court of Appeals held that the evidence "did not tend to show that Crane received or had access to inside information" and therefore the only issue is whether the Court below was correct in its "evidentiary conclusions" (Br. in Opp. 2). Crane is simply in error, for the Court of Appeals in fact considered the evidence establishing Crane's access to inside information (10a-12a), accepted it as true and held that Crane was nevertheless not liable (23a). The issue before this Court, then, is not the correctness of the lower Court's "evidentiary conclusions", but the validity of its legal conclusion that Crane is not liable notwithstanding its demonstrated access to inside information.

Despite Crane's efforts to dispute the evidence,[2] there is and can be no reasonable doubt that Crane ob-

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[1] The Court of Appeals wrote at various points in its opinion:

"We believe that *Kern County* holds the defensive merger situation to be *sui generis* in terms of § 16(b) liability." (17a)

"We see no public policy to be promoted in such case through the medium of Section 16(b)." (18a)

"The important consideration is that the information Crane was likely to receive was in no way increased by its making of a tender offer" (18a).

[2] At the very least, Crane's evidentiary argument leads to the conclusion that rather than granting its motion for summary judgment and dismissing the complaint, the Court of Appeals should have remanded for a trial of disputed issues of fact.

tained confidential information from inside sources, for the evidence comes from the mouth of Crane's own chief executive officer, T. M. Evans, who testified that Crane learned of Air Brake's merger negotiations in late January 1968 from *Air Brake's financial advisor* (Ct. App. A. 215-217, 135, 219-220), and that he was told the merger price—$50 per share—on February 23 by *an Air Brake director*, John A. Mayer (Ct. App. A. 248-250, 252). Moreover, on March 1, 1968, the week before the announcement of the merger agreement to the public, Evans sent telegrams to the Air Brake directors saying: "We are advised that you have been negotiating a merger or sale of [Air Brake]" and asking an opportunity to present a "counter proposal" (11a n.8). There could not be a more categorical confession that Crane had advance knowledge of the merger.

Since Crane can hardly repudiate Evans' testimony, it tries to blunt its effect by claiming that the information he obtained in late January was mere "rumor" (Br. in Opp. 7) and that what Mayer told him on February 23 was "false" (Br. in Opp. 9) because, says Crane, Standard and Air Brake did not begin merger negotiations until "the week of February 26" (*ibid.*). These assertions are flatly refuted by the Court of Appeals' findings in a related case, *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), where, in rejecting Crane's claim that the Air Brake proxy statement had misrepresented the origins and purpose of the merger, the Court expressly held that Air Brake's board had considered the merger as early as January 22 and on that date had "specifically authorized [the company's president] to proceed with detailed studies of the consequences of a merger with Standard, or alternative companies . . . ." 419 F.2d at 802.

Evans testified that he learned about the possible merger at precisely this time (Ct. App. A. 215-217, 135, 219-220). Crane was then only a few shares short of having 10% of Air Brake's stock, and was already its largest stockholder. There is no evidence that the channels by which Evans obtained this strategic information were somehow dried up a few days later when Crane—admittedly prompted to buy more Air Brake stock by its knowledge of the pending merger discussions (Ct. App. A. 215-217)—became a 10% stockholder and thus a statutory insider. This episode confirms that Crane had *access* to inside information from the moment it became a 10% stockholder, and it is such access that is the basis of liability under the *Occidental* rule.

The events of February 23, four weeks after Crane had become a 10% stockholder, show that its pipeline into Air Brake's inner councils was as productive as ever. As the Court of Appeals found in its 1969 opinion, "on February 19 Standard made its first suggestions as to possible terms of merger." 419 F.2d at 802. On the following day, February 20, the Air Brake directors met and, in spite of Mayer's arguments to the contrary, "were impressed with the high valuation offered for Air Brake stock, $50 per share, and authorized [Air Brake's president] to negotiate the merger." *Ibid.* Three days later, on February 23, Mayer divulged this offer to Evans. (Ct. App. A. 248-249).

In spite of Crane's pretense that this conversation occurred on February 16 rather than February 23 (Br. in Opp. 8), Evans' testimony is clear and unequivocal as to the later date. His testimony was given on direct examination by Crane's own counsel. If Evans had inadvertently misstated this critical date, he or his counsel would surely have corrected it at once rather than attempting to do so in a brief filed seven years later.

In any event, there is no doubt that in the decision below the Court of Appeals accepted Standard's version

of both of these incidents. Its opinion stated that "in the early part of 1968" Crane obtained information "that Air Brake was negotiating with other companies" (10a). It repeatedly referred to the Mayer-Evans telephone conversation "on February 23rd" (10a-11a). It pointedly observed that such misuse of inside information "could be a violation of Section 10(b) and Rule 10b-5" (20a).[3]

In short, the Court of Appeals did not reject Standard's claim because of insufficient evidence, but because it read this Court's *Occidental* decision as requiring such a result notwithstanding this evidence.

This ruling raises a far-reaching question of law that we ask this Court to review.

II.

Crane's repeated statements that the evidence showing its receipt of inside information was not presented to the District Court is not only erroneous (Ct. App. A. 63-72), but is immaterial in light of the fact that the Court of Appeals entertained this evidence.

Crane recognizes (Br. in Opp. 13n.) that a District Court judgment can be sustained on any ground that finds support in the record, *Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957) (and other authorities cited at Pet. 13 n.20), but argues that the rule is inapplicable here because of a local court rule (Rule 9(g) of the Southern District

[3] In attempting to reconcile the supposed dictates of *Occidental* with the clear evidence that Crane had in fact obtained access to critical inside information, the Court below assumed—without citing any evidence—that Crane's acknowledged receipt of inside information had come about through "casual acquisition" or "personal friendship" (20a), but it overlooked the fact that this information was given to Crane by Air Brake's financial advisor and one of its directors.

of New York, quoted at 23a n.18) requiring the parties on a summary judgment motion to present a statement of contested and uncontested facts.

But at the time the parties submitted their 9(g) statements—nearly three years before this Court's *Occidental* decision—Crane had moved for summary judgment on the basis of a single, narrowly defined defense that bore no relation to the question of access to inside information.[4] Both parties' 9(g) statements were necessarily made in light of that one contention, which the District Court rejected and which the Court of Appeals did not consider. Later in the District Court proceedings, Crane made much broader contentions without amending its 9(g) statement. Since the District Court considered (and rejected) those contentions without requiring such an amendment, there was no reason for Standard to amend its own 9(g) statement. The Court of Appeals, following this Court's decision in *Occidental*, likewise considered Crane's broader contentions in spite of the lack of supporting 9(g) statements.

In short, the 9(g) statements filed by both parties were addressed to an issue that is unrelated to what the Court of Appeals decided or to what Standard now seeks to have reviewed. This case has proceeded through both of the lower courts with the tacit understanding that amended

[4] The sole basis of Crane's motion was that the merger and Crane's subsequent sale of its holdings had been brought about by Standard's "manipulation" of Air Brake's stock on a single day some five weeks before the expiration of Crane's exchange offer and some seven weeks before the merger. Litigation as to the claimed one-day "manipulation" and its alleged consequences (which consequences, if any, have never been determined by any court) is now in its eighth year. In 1973 the Second Circuit observed: "Certainly it is not to be merely assumed that but for Standard's acts on April 19, 1968, Crane's tender offer would have succeeded and the merger would have failed." *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332, 344 (2d Cir. 1973).

9(g) statements were unnecessary. Crane's attempt to use local rule 9(g) as an obstacle to review in this Court is nothing but a red herring.

III.

In seeking to avoid liability on the basis of its post-merger sale of the merged company's convertible preference stock, Crane denies or obscures (Br. in Opp. 17) the fact that at the time of this sale Air Brake and Standard had been successive owners of a continuing business enterprise, and that Crane had been a 10% stockholder of both.

Upon the merger, the business formerly owned by Air Brake constituted more than a third of the total assets of the combined company. As the evidence clearly shows, Crane before the merger had access to confidential information about Air Brake's business. Since that business became Standard's business immediately upon the merger, any confidential information that Crane had acquired about that business was no less valuable after the merger than before. Moreover, during the immediate premerger period the Air Brake management was given a considerable amount of confidential information about Standard itself, first in connection with the merger negotiations and later in preparation for effectuating the merger. Any Air Brake insider may have had access to such information, including Crane. Indeed, there is evidence that Air Brake in fact *did* give Crane confidential information about Standard.[5]

As pointed out in Standard's petition (Pet. 19-21), the Court of Appeals' decision elevates form over substance

[5] 1560 R. 50, pp. 410-414, 430-432; Exs. 16, 17; 2461 R. 87 (13), p. 22n.

in treating the premerger Air Brake as a separate "issuer" from the combined corporation immediately after the merger merely because Standard was treated as the "surviving" corporation for certain internal purposes. Crane attempts to justify this illogical and formalistic result by saying that even if Standard had been merged into Air Brake (instead of the other way around) it would not have been liable if it had received and then sold Air Brake convertible preference stock, which (Crane says) could not be matched against the premerger common (Br. in Opp. 18-19). But since the preference stock carried the unconditional right to acquire the underlying common, Crane's sale of the preference stock would have constituted a sale of the common as well, so contrary to Crane's assumption, liability *would* attach in such circumstances. *Blau* v. *Lamb*, 363 F.2d 507, 525 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); *Chemical Fund, Inc.* v. *Xerox Corp.*, 377 F.2d 107 (2d Cir. 1967). By the same token, unless the form of the merger and the name of the merged company are to be given decisive significance, liability should attach in the circumstances of the present case.

Similarly doubtful is Crane's unsupported assertion that in *Newmark* v. *RKO General, Inc.*, 425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970), RKO would have escaped liability if Frontier had merged into Central (rather than the reverse) "because it would have retained its Central shares instead of selling them" (Br. in Opp. 19). Under *Occidental*, *Newmark* and their progeny, liability in such a case does not depend on which company has merged into the other, or on the name that the merged company has been given, but on whether the circumstances have permitted a misuse of inside information.

The anomaly of the decision below is that, on a record plainly showing access to (and actual possession of) con-

fidential information by a statutory insider that bought and profitably sold hundreds of thousands of shares within less than six months, liability has been made to turn on the form of the merger and on the name of the surviving company. This anomaly is highlighted by Crane's concession that, if Standard had been merged into Air Brake and Crane had then sold its Air Brake shares, "it might be reasonable to impose liability" (Br. in Opp. 20). If liability would be imposed in such a case—and we agree with Crane that it would—there is no reason to withhold liability merely because the surviving company was Standard rather than Air Brake. Both circumstances present a clear opportunity for speculative abuse.

Finally, Crane's statement that this case presents no issue of general importance is belied by the fact that the decision below will manifestly affect the planning and execution of every contested tender offer, and indeed every contest for corporate control, and will severely limit the protection against the misuse of inside information that § 16(b) is designed to provide. According to the SEC's Annual Reports, the requisite schedules for 43 tender offers were filed in fiscal 1971, for 50 in 1972 and for 75 in 1973. Every one of these and—more importantly, every one of those to come in future years—will be potentially affected by the decision below.

CONCLUSION

For the foregoing reasons, and the reasons stated in Standard's petition, certiorari should be granted and the decision below should be reversed.

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